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SENATE REPUBLICAN POLICY COMMITTEE

Legislative Notice

No. 30 September 17, 2007

S. 1257 – District of Columbia Voting Rights Act of 2007

Calendar No. 257

The Committee on Homeland Security and Governmental Affairs favorably reported S. 1257 by a vote of 9-1[1] on June 28, 2007, S. Rept. 110-123.

Noteworthy

- A cloture vote on the motion to proceed to S. 1257 will occur at 2:30 p.m. on Tuesday, September 18, 2007.

- S. 1257 expands the number of members of the House of Representatives from 435 to 437 beginning with the 111th Congress.

- The District of Columbia will be permanently allocated one of these seats; the other will initially be assigned to Utah and then reallocated based on the next congressional apportionment following the 2010 census.

- The additional representative from Utah will be elected pursuant to a redistricting plan which must account for the new seat. This will be effective for the 111th and 112th Congresses. Both new representatives will be seated on the same day as other members of the 111th Congress. The legislation will repeal the office of District of Columbia Delegate.

- The bill provides for expedited review of the legislation, if signed into law, by a three-judge panel of the United States District Court for the District of Columbia, which can be appealed directly to the Supreme Court.

- The House passed companion legislation, H.R. 1905, on April 19, 2007, by a vote of 241 to 177.[2]

[1] Including proxy votes, the vote was 12-5.

- The White House said that it would veto similar legislation introduced in the House of Representatives because the bill "violates the Constitution's provisions governing the composition and election of the United States Congress."

Bill Provisions

S. 1257 expands the number of members of the House of Representatives from 435 to 437 beginning with the 111th Congress. The District of Columbia will be permanently allocated one of these seats; the other will initially be assigned to Utah and then reallocated based on the next congressional apportionment following the 2010 census.

The legislation has three main provisions:[3]

1) Provides that the District of Columbia shall be considered a congressional district for purposes of representation in the U.S. House of Representatives. The bill specifies that the District shall not be considered a state for purposes of representation in the Senate. The bill also clarifies that the District remains entitled to three Presidential electors as required by the 23rd Amendment.

2) The number of members of the House of Representatives will be permanently increased to 437 from 435. The District will receive one additional seat and may not receive more than one seat in any future reapportionment. Utah will receive one additional seat for the 111th and 112th Congresses.[4] The additional representative from Utah will be elected pursuant to a redistricting plan which must account for the new seat, which will be effective for the 111th and 112th Congresses. The seat is subject to reapportionment after the 2010 census. Both new representatives will be seated on the same day as other members of the 111th Congress. The office of District of Columbia Delegate will be repealed.

3) The bill provides for expedited review of the legislation, if signed into law, by a three-judge panel of the United States District Court for the District of Columbia, which can be appealed directly to the Supreme Court. If the court invalidates any provision of the legislation, the entire legislation is void.

[2] House Roll Call Vote #231 (April 19, 2007).
[3] The bill passed by the House, H.R. 1905, differs from S. 1257 in that it creates an at-large district for the new seat granted to Utah (which raises separate Constitutional concerns) and does not contain provisions for expedited judicial review.
[4] Projections show that Utah would have received an additional seat after the next census irrespective of Congressional action. As the Committee report accompanying S. 1257 notes, Washington County in Southern Utah is the nation's fastest-growing metro area.

Background

Since 1970, residents of the District of Columbia have voted for a Delegate who represents them in the House of Representatives.[5] This Delegate can introduce legislation, serve on standing congressional committees, vote in these committees, debate on the floor of the House, and vote in the Committee of the Whole.[6] However, a revote is required (without the vote of the Delegate) if the vote of the Delegate proves decisive.

Various attempts have been made to grant the District full voting rights, including: 1) a constitutional amendment to grant voting rights to residents of the District, but not providing statehood for the District; 2) granting statehood to the non-federal portion of the District, 3) allowing District residents to vote in Maryland; and 4) retrocession of the non-federal portion of the District of Columbia into Maryland. None of these efforts has succeeded.

S. 1257 attempts to grant the District representation through statute. Pursuing such a change in the composition and structure of Congress through statute rather than constitutional amendment raises a number of important considerations. The plain language of the Constitution suggests that representation of the House is limited to states. A review of the legal issues by the Congressional Research Service (CRS) stated that it is "likely that the Congress does *not* have authority to grant voting representation in the House of Representatives to the District of Columbia…"[7] (emphasis added). Therefore, a statute such as S. 1257, which grants full representation in the House of Representatives to the District, would likely face a constitutional challenge in court.

Supporters of S. 1257 make a series of arguments that the Constitution gives Congress sufficient legislative power over the District to enable Congress to grant the District voting representation. They argue that courts have described congressional power over the District as "extraordinary and plenary" and "full and unlimited."[8] They cite a number of court cases since the 1800s where courts have interpreted this power in a way that is not confined by the use of the word "state" in Article I. Moreover, they point out that a strict textual reading of the Constitution would also invalidate centuries of precedents which hold that District residents are subject to federal taxation, federal court jurisdiction, and federal regulation of commerce. Finally, they note that Congress has provided that Americans who live overseas, and not in a state, may participate in congressional elections. Therefore, if Congress can provide representation for citizens living overseas, it can provide representation to those living in our nation's capital.

[5] P.L. 91-405, 84 Stat. 845, Sept. 22, 1970.
[6] H.J. Res. 78, Jan. 24, 2007.
[7] Congressional Research Service Report to Congress, Report #RL33824, "The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole," September 14, 2007. [Hereinafter "CRS Report on Constitutionality"].
[8] Dear Colleague Letter from Senator Hatch, September 12, 2007.

Constitutional Issues:

- Article I, Section 2:

Article I, Section 2 of the Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State legislature." Article I, Section 2 further requires that a Representative "be an inhabitant of that State in which he shall be chosen."

In 2000, a three-judge panel of the United States Federal District Court for the District of Columbia (the same court designated by the legislation to hear an expedited challenge to the legislation) ruled that District residents did not have a constitutional right to congressional representation. Reviewing Article I, Section 2, the court found that "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives."[9] The court went on to review cases dating back to 1805, and concluded that "every other court to have considered the question—whether in dictum or in holding—has concluded that residents of the District do not have the right to vote for members of Congress."[10] The Congressional Research Service agreed that this conclusion "has been consistently reached by a variety of other courts, and is supported by most, though not all, commentators."[11]

However, courts have often read "states" in the Constitution to include the District. For example, for purposes of diversity jurisdiction, Article III gives the federal courts jurisdiction in suits "between citizens of different states." The Supreme Court ruled that this could include citizens of the District.[12] Similarly, the Constitution provides that "direct taxes shall be apportioned among the several states." This has also been held to include the District.[13] Similar arguments apply to court decisions regarding the right to a speedy trial[14] and the authority to regulate interstate commerce.[15]

The court in *Adams* specifically rejected this analogy to Congress' exercise of its powers under other provisions in the Constitution, saying that the cases cited above "do not involve Article I, nor do they involve constitutional rights that textually appear to require

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[9] *Adams v. Clinton*, 90 F.Supp.2d 35, 46-47 (D.D.C. 2000), aff'd, 531 U.S. 940 (2000). The court also found that including the District within the definition of "state" is inconsistent with the provisions of Clause 3 of Article I, Section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective numbers." U.S. Const. Art. I, § 2, cl. 3.

[10] *See, e.g., Hepburn and Dundas v. Ellzey*, 6 U.S. 445 (1805) ("[A] citizen of the District of Columbia is not a citizen of a state within the meaning of the constitution.") (emphasis in original); *LaShawn v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) ("The District of Columbia is not a state. It is the seat of our national government...").

[11] CRS Report on Constitutionality.

[12] *National Mutual Ins. Co. of the District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

[13] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820).

[14] *Callan v. Wilson*, 127 U.S. 540 (1888).

[15] *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

citizenship (or residence) in a state."[16] The court will treat each situation differently depending on the context and character of the provision;[17] "Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved."[18] The court further distinguished between constitutional clauses "affecting civil rights of citizens" and "the purely political clauses," among which are "the requirements that members of the House of Representatives be chosen by the people of the several states."[19]

- Article 1, Section 8:

Article 1, Section 8, Clause 17, known as the "District Clause," gives Congress broad power to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States…" However, while the District Clause grants Congress the power to govern the District, it is unclear that this includes the authority to alter the form of the federal Congress.

Though S. 1257 specifies that representation should not be granted to the District in the Senate, the argument regarding the inherent powers of Congress over the District could potentially extend to permit Congress to legislate representation in the Senate for the District.[20] The court in *Adams* noted that the compromise between states embodied in the structure of the House and Senate would be undone by granting the District a seat in the House but not in the Senate. "Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings."[21]

- History of the District and Voting Rights for District Residents:

The need for an independent national capital became apparent in 1787 when a group of disbanded soldiers demanding pay threatened congressional delegates meeting in Philadelphia. Congress asked the government of Philadelphia for protection and support, but the state refused, forcing the Congress to disband and reconvene in New Jersey. Following this, Congress acted to ensure that the newly-formed District would be

[16] *Adams*, 90 F.Supp.2d at 46-47. Similarly, CRS concluded that, "While there has been some academic commentary suggesting that the term 'state' could be construed more broadly for purposes of representation than is currently the case, there is little support for this proposition in case law." CRS Report on Constitutionality.
[17] *See Tidewater Transfer Co.*, 337 U.S. at 619 (Rutledge, J, concurring).
[18] *D.C. v. Carter*, 409 U.S. 418, 420 (1973).
[19] *Adams* 90 F.Supp.2d at 54, *citing Tidewater Transfer Co.*, 337 U.S. at 587.
[20] CRS further notes that the reasoning put forward by supporters of the legislation would also give Congress power under the Territory Clause to grant voting rights to the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands, a move that "would clearly represent a significant change to the national political structure." CRS Report on Constitutionality.
[21] *Adams* 90 F.Supp.2d at 50.

beholden only to the federal government for support.[22] The *Adams* court examined the relevant history and concluded that "such evidence as does exist… indicates a contemporary understanding that residents of the District would not have a vote in the national Congress."[23]

However, prior to passage of the Organic Act of 1801,[24] District of Columbia residents were able to vote in Maryland or Virginia, the states that ceded the land which became the District. Some scholars argue that it was assumed that the states that ceded this land would make appropriate provisions in their acts of cession for the rights of residents of the ceded land.[25] They conclude that because these states failed to make such provisions for residents of the new District, Congress should remedy their disenfranchisement.

- Prior Changes Regarding the District's Representation in the Federal System:

The 23rd Amendment, which provides for the appointment of presidential electors by the District, was enacted through an amendment to the Constitution.[26] That amendment begins, "The District constituting the seat of Government of the United States shall appoint…" The text further provides that: "[the electors] shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of the President and Vice President, to be electors appointed by a State."

Moreover, in 1978, two-thirds of both the House and the Senate approved a constitutional amendment similar to the legislation now under consideration, but it failed to win the ratification of the requisite number of states.[27] Only 16 of the required 38 states supported the amendment by the time it expired in 1985.

Administration Position

The White House said that it would veto similar legislation introduced in the House of Representatives because the bill "violates the Constitution's provisions governing the composition and election of the United States Congress."[28]

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[22] *See* Testimony of the Hon. Kenneth Starr before the House Government Reform Committee, June 23, 2004.
[23] For further discussion of this history, *see* CRS Report on Constitutionality.
[24] 2 Stat. 103 (1801).
[25] Testimony of Professor Viet Dinh before the U.S. Senate Committee on Homeland Security and Governmental Affairs, May 15, 2007.
[26] Since 1888, approximately 150 constitutional amendments have been introduced to address voting rights for the District, but only the 23rd Amendment passed. CRS Report to Congress on Constitutionality.
[27] H.J. Res. 554 (1978). When the House Judiciary Committee, under the leadership of Democratic Chairman Peter Rodino, reported H.J.Res. 554, the accompanying report stated the following: "If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; *statutory action alone will not suffice.*" H. Rep. No. 95-886 (95th Cong., 2d Sess.) at 4. (emphasis added).
[28] http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1433sap-r.pdf.

Cost

The Congressional Budget Office estimates that the legislation would increase direct spending by about $200,000 in 2009 and by about $2 million over the 2008-2017 period. In addition, implementing the bill would have discretionary costs of about $1 million in 2009 and about $7 million over the 2008-2012 period, assuming the availability of appropriated funds.